JoJene Mills
LAW OFFICE OF JOJENE MILLS, P.C.
State Bar No. 010372; PC No. 64891
1670 East River Road, Suite 270
Tucson, Arizona 85718
(520) 529-3200 – Phone
jmills@jmillslaw.com

Lawrence J. Rudd, M.D., J.D.
RUDD MEDIATION
Admitted in California 150652, Pro Hac Vice in AZ#1010420
1414 Ridge Way
Pasadena, California
(626) 795-3339 – Phone
lrudd@ruddmediation.com

Arlan A. Cohen, MD,
LAW OFFICES OF ARLAN A COHEN
Admitted in California 149200, Pro Hac Vice in AZ #1010419
1008 South Oakland Avenue
Pasadena, California 911
(626)449-9209 – Phone
arlancohen@gmail.com

Attorneys for Plaintiffs/Respondents

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

BANNER UNIVERSITY MEDICAL CENTER TUCSON CAMPUS, LLC, an Arizona Corporation dba BANNER UNIVERSITY MEDICAL CENTER TUCSON; GEETHA GOPALAKRISHNAN, MD; MARIE L. OLSON, MD; EMILY NICOLE LAWSON, DO; DEMITRIO J. CAMARENA, MD; PRAKASH JOEL MATHEW, MD; JASON THOMAS	No. 2CA-SA 2019-0051 Pima County Superior Court No. C20174589 **RESPONSE OF RESPONDENTS HARRIS TO PETITION FOR SPECIAL ACTION**

ANDERSON, MD; SARAH MOHAMED DESOKY, MD; BANNER HEALTH; BANNER UNIVERSITY MEDICAL GROUP,

Defendants/Petitioners

v.

RICHARD E. GORDON, JUDGE OF THE SUPERIOR COURT OF ARIZONA, PIMA COUNTY,

Respondent Judge,

v.

JEREMY AND KIMBERLY HARRIS,

Plaintiffs/Real Parties in Interest.

Petitioners seeks to bring about a first-time, massive expansion of the ambit of special protections for government entities found in A.R.S. §§ 12-821 and 12-821.01, by arguing that one private, nongovernmental health care provider, Banner Health, effectively purchased a shortened statute of limitations and a Notice of Claim requirement simply by hiring physicians to do their corporate work who are also, separately, state employees. Banner claims *de facto* governmental immunity for the lethal acts and omissions of its employees committed during the course and scope of their Banner employment, simply because these employees also had University employment contracts. This is contrary to established legal authority.

Connor Harris died from negligent medical care after a 2015 business deal that the University of Arizona entered into with Banner Health. Banner acquired the

University Medical Center hospital, University Physicians Healthcare, (the non-governmental corporate entity that employed physicians) and other assets. One of the elements of this business deal was that Banner Health (an established, multi-state health care entity), through its new, private corporation, "Banner University Medical Group Tucson," ("BUMG") would assume 100% control and responsibility for every aspect of the provision of medical care by any physician (attending physicians, fellows and residents) at the Tucson hospital, which was renamed Banner University Medical Center Tucson (BUMCT). Banner also agreed to accept 100% liability for any malpractice, thus relieving the State of Arizona of ALL financial responsibility for this case and all other claims that issued out of medical care rendered after July 1, 2015, after the Banner deal. *It is undisputed that under no circumstance will the University or State incur any financial liability for this case, or any case occurring at BUMCT after the Banner deal*.

In the deal, Banner, not a governmental entity, assumed plenary control over *every* aspect of the rendition of medical care by the physicians whose services it paid for, whom it insured 100% for malpractice and worker's comp, over whom it had the right to hire, fire, and regulate hours and methods of practice, to whom it provided the practice facility, all equipment, ancillary personnel, ancillary services and all other elements of employment.

It is important to note that Banner admits that it had control, supervision, employment of all the doctors involved, both residents and attending physicians. Banner has been telling plaintiffs' lawyers all over the state, ever since the acquisition, that it accepts vicarious liability for these doctors, so as to convince the plaintiffs' lawyers not to name the doctors individually. In other words, in this particular case, but for the procedural dismissal of the doctors, Banner admits it would be vicariously liable for the doctors' negligent acts. Presumably, Banner will admit that if the Harrises had never named the individual doctors and those doctors had never been dismissed, Banner would have no argument at all to avoid vicarious responsibility. Banner is now asking this Court to change the law of vicarious liability so Banner can use the very unique circumstances of this case and the government notice of claim and statute of limitations statutes to avoid responsibility for the doctors it admittedly controlled, supervised, employed.

Despite these facts, the trial judge *incorrectly* found that the individual physicians involved in this case were entitled to a Notice of Claim and shortened statute of limitations. They were dismissed because respondents, through previous counsel, believed these statutes were inapplicable and proceeded like they would against any other private, non-government individuals and entities.

However, the trial judge then *correctly* found that the physicians' dismissal did not entitle the private Banner corporations to dismissal of vicarious liability

claims for the physicians' negligence. The Banner defendants now seek special action review of just this last ruling.

Banner seeks to bring about this sea change in Arizona law, not through A.R.C.P. Rule 54(b), but in expedited fashion pursuant to A.R.S.A 7, though there are at least three avenues to a *complete* remedy for petitioners outside of special action relief. Granting defendant's petition would therefore engender *two* premature appellate proceedings, one or both of which would be ultimately unnecessary if the petition was denied and the case proceeded to trial. If the petitioners prevail, their appeal would be unnecessary. If the respondents prevailed, our Cross-Petition would be unnecessary. If the case settled, neither appeal would be necessary. And if any appeal was necessary, if it was deferred until the time prescribed by Arizona law, the full panoply of evidence that an appellate court would want and need to make the best possible decision based on facts and law would have been put on the record.

The issues are not of state-wide interest, as they pertain only to Banner Health and its unique business deal with the University of Arizona. The extraordinary special appeals process must be applied sparingly because Rule 54(b) was passed for good reasons. In addition, Banner's central argument for "urgency of appeal" is based on facts and arguments about the National Practitioner Databank, raised *for the first time on appeal.* The NPDB issue is conclusory, lacks evidentiary basis, and

is false in its claim of the consequences of bringing their ultimate appeal after the trial, in the usual course of Arizona law, if it even proves necessary then.

Banner's argument for extraordinary interlocutory relief asserts "forever" material harm to the physicians whose ignorance, indifference, lack of supervision and frank sloth caused a child's death, simply from having to testify to their misconduct under oath. But is *the child's death* that is "forever," not the illusory claimed harm to the physicians, who, dismissed from the case, are not now aggrieved parties in the case.

In addition, special action relief is not required because the trial court's ruling is correct under well-established Arizona law. The trial court's determination was neither arbitrary nor capricious. Not a single case cited by petitioners supports their argument that when government employees are dismissed on the basis of A.R.S §§12-821 and 12-821.01, these statutes can also be used to obtain dismissal of non-governmental corporations unless they got notice of the claim 18 months before the running of the two-year statute of limitations that applies to all other non-governmental entities sued for medical malpractice in Arizona.

Further, this petition has forced respondents to file our own Cross-Petition for Special Action, filed concurrently with this response, for review of what we consider to be the trial court's erroneous determination that the physicians initially named in this action were entitled to the application of A.R.S. §12-821 and 12.821.01 in the

first place. If this Court should decide that special action review of the Banner dismissal is appropriate, then the Court should also review the erroneous dismissal of the individual physicians.

The purpose of the Notice of Claim statute, and the shortened statute of limitations for the filing of actions against a governmental entity, as set forth in numerous Supreme Court and appellate decisions, was solely to permit the governmental entity to do early review and assessment and implement early settlement of medical malpractice cases, to limit governmental exposure to liability thereby, and to budget for possible liability. However, the terms of the 2015 deal, as set forth in the University's Affiliation Agreement with Banner Health, as established by admissible and undisputed evidence presented to the trial court, eliminated *all* potential financial exposure of any governmental entity or employee for liability for medical negligence committed at BUMCT, making the application of A.R.S. §12-821 and 12-821.01 in this case distinct from and unrelated to the legislative purpose of the statute. Because the trial court's determination of the application of §§12-821 and 12-821.01 to the physician petitioners, which led to the physicians' dismissal by summary judgment, is so closely related to the trial court's ruling that is challenged by petitioners in *this* petition, granting this petition must, in the interests of justice and equity, be accompanied by granting of the Harris Cross-Petition.

The protections of A.R.S. §§12-821 and 12-821.01, are not and should not be, for sale to private parties. In purchasing the university assets and assuming 100% control over and liability for the delivery of clinical care at the Tucson hospital, the Banner private corporate entities removed any reason to apply protections for government entities. Banner's petition should be denied.

I. FACTS

A. The Only True Petitioners are Banner Health and Banner University Medical Group.

From the beginning, petitioners have been purposely imprecise about the identities of the corporate entities, stating here and below, "Banner University Medical Center Tucson Campus (BUMCT), formerly the University of Arizona Medical Center, is an academic teaching hospital *affiliated with* the University of Arizona College of Medicine. It is a state entity. See A.R.S. § 15-1601." (Petition at 5, lines 17-20, emphasis added.) This is a false statement and the ruling at issue *does not rely on* any argument or evidence that the Banner corporations themselves were state entities entitled to a Notice of Claim or shortened statute of limitations. Because of the issues, it is important for this Court to understand the nature of the parties involved.

None of the Banner entities named in this lawsuit (Banner Health, Banner University Medical Group ("BUMG") or the hospital, Banner University Medical Center Tucson ("BUMCT") are government entities. All Banner entities are private,

non-governmental corporations, so listed by the Arizona Department of Corporations. (Harris App.[1]1, Complaint, Ex. 1, named Banner entities listed by Arizona Department of Corporations; Harris App. 6, Ex. 7)

Respondents Harris never named any state entities, such as the Arizona Board of Regents, the State of Arizona or the University of Arizona. Respondents have repeatedly stated, and shown with record evidence, that at the time of the negligence, BUMG and BUMG only provided *all* clinical care delivered at the hospital (BUMCT) by any physician, including all attending physicians, resident physicians and fellows. (Harris App. 6 ¶¶20-26) Respondents supplied evidence that Banner Health was the parent corporation of BUMG and BUMCT. (Harris App. 6, ¶6) Finally, respondents have shown that Banner Health and BUMG have always been private corporations. (Harris App. 6, ¶6) Again, neither Banner Health, nor BUMG nor BUMCT have ever, in this or any litigation, argued or shown evidence that they are governmental entities, themselves entitled to the protections of §§12-821 or 12-821.01.

Therefore, respondents have always alleged that *BUMG and Banner Health alone* are vicariously liable for any physician negligence. Under these undisputed

[1] Respondents Harris have today filed an Appendix that supports both the Harris Response to Banner's Petition and the Harris Cross-Petition. For clarity's sake, we will refer to the parties' appendices as either "Banner App." or "Harris App."

facts, only Banner Health and BUMG are aggrieved by Judge Gordon's ruling refusing to dismiss vicarious liability claims.[2]

Nevertheless, petitioners here also apparently intended to indicate, from the caption, that *all initially named defendants* are petitioners, seeking special action relief. This is not supportable. All the individual defendant physicians were dismissed *before* the ruling that is the subject of this petition and therefore have no standing to petition this court for relief. They are also not aggrieved in any way by the ruling. In addition, respondents have never alleged that BUMCT (the hospital), employed any physicians or is vicariously liable for physician malpractice. Respondents have separate claims of negligence against the hospital and its employees that are not involved in the ruling at issue.

B. <u>The Medical Malpractice</u>[3]

Respondents have alleged the following facts in the complaint and subsequent motions, based on medical records provided by petitioners and deposition testimony taken from treating physicians, nurses and experts.

---

[2] The Motion for Summary Judgment that Judge Gordon denied was filed by "Defendants." (Harris App. 7) In opposing summary judgment, respondents clarified that Banner Health and BUMG were the vicariously liable parties. Judge Gordon's order denies "summary judgment to Defendant Banner University Medical Center Tucson Campus, LLC" but this is likely a typographical error.

[3] The malpractice facts are found in the record below in Plaintiff's Fourth Supplemental Disclosure Statement with attached expert declarations. (Harris App. 6, Ex. 1)

On October 23, 2015, Connor Harris, a 14-month-old child, was brought to an emergency room in Safford, Arizona because of screaming episodes and vomiting of bilious (green) material. The Safford emergency room physician diagnosed an acute surgical abdomen, and abdominal films showed a bowel obstruction. He feared that the child's life was in danger. Having no pediatric surgeon in this small town, and no ability to obtain an UGI or CT scan at his hospital without a delay of several hours, which delay he felt could be harmful or fatal to the child, he arranged for the child's emergency transfer by helicopter to Banner University Medical Center Tucson (BUMCT), specifically for "STAT" evaluation by a pediatric surgeon, sending the child's ER record and films with him. The physician at Banner in charge of transfers accepted the child, assuring the ER doctor that the surgical emergency would be competently handled.

But upon arrival, this doctor did not admit the child to the pediatric surgery service, nor did she consult the pediatric surgery service or notify it of Connor's admission. She admitted Connor Harris instead to the general pediatrics service, where the attending physician, resident trainee and nurse failed to read the transfer papers or speak to the parents to discern, bilious vomiting, a potential sign of a surgical emergency. The physician ordered tests not capable of showing the reason for the obstruction, waited more than five hours for the report of a "STAT" ultrasound which normally is required in 90-120 minutes, which ultrasound was

misread by the radiologist as appendicitis. The pediatrician and nurses then failed to ascertain or deal with the child's continuing bilious vomiting through the day.

The pediatric surgeon, once called, did not show up, sending in his place an intern, whose experience in pediatric surgery was *22 days*, to do the consultation. The absentee pediatric surgeon and the intern failed to deal with the child's progressive deterioration. A STAT CT scan, also delayed several hours despite the STAT order, was interpreted only by a general radiology resident, with no input from the attending pediatric radiologist, who had gone home. The resident mis-read the CT, missing entirely the volvulus/obstruction and early signs of compromised bowel circulation. These were life-threatening signs. Not until the next morning, when the pediatric radiologist came in, was the CT scan properly interpreted, showing what was uniformly agreed to have been, the prior night, a "level one" surgical emergency, requiring surgery within an hour, according to the deposition of the surgeon on call. Volvulus with obstruction is an emergency surgical condition, the correction of which takes less than half an hour. At surgery, more than 12 hours after the CT was misread, the child's entire small bowel was found to be dead. The child died that afternoon.

***

***

C. The Lawsuit

This lawsuit followed. Prior counsel did not file government claims against the physicians named within 180 days of Connor Harris's death or a lawsuit within one year.

All of the doctors named except the pediatric surgeon had employment agreements with the University of Arizona, and hence were University employees. However, as documented in the Affiliation Agreements between the University, and Banner, confirmed in depositions, when rendering clinical care at the BUMCT hospital, the physicians were employees of Banner Health and its subsidiary, Banner University Medical Group (BUMG), 100% subject to the control of BUMG and BUMCT. (Harris App. 6, ¶¶27-57) Banner provided full malpractice insurance coverage and full worker's compensation coverage as related to clinical care rendered at BUMCT. (Harris App. 6, ¶10) Banner, through BUMG's CEO, had the right to determine the hours and work schedule of the physicians, which physicians could and which could not work at the hospital, who had to take retraining or rehabilitation, determined in the sole discretion of the BUMG CEO, before they were permitted to resume seeing patients at BUMCT. (Harris App. 6, ¶32-33, 38-39) BUMG determined what the salary structure for physicians would be, including how physicians with identical job descriptions would be paid, sometimes differently. (Harris App. 6, ¶35) Banner provided the facility, all equipment, all ancillary

services (laboratory, pathology, radiology) all ancillary personnel (nurses, lab techs, OR techs) needed to treat patients. (Harris App. 6, ¶58-60) Banner *alone,* to the exclusion of the University and the physicians, contracted with patients for medical services, sent the bills for physician services in Banner's name, collected the payments for those billings, and owned these collections, paying for their employee physicians' services through the University. (Harris App. 6, ¶¶51-55) All disputes at BUMCT were determined conclusively by the CEO of BUMG , again with no University right to intervene. (Harris App. 6, ¶56) There is no Arizona statutory or case law definition of "employment by Banner" that was not satisfied by the arrangements set forth in the affiliation agreement.

Petitioners moved for 12(b)(6) dismissal of the doctors and of Banner Health, BUMG and BUMCT on the basis of the doctors' employment by the University. The trial court permitted respondents to conduct discovery about the presence of asserted dual employment. The Affiliation Agreements and deposition testimony of University physicians and of BUMCT and Regents personnel confirmed that after the Affiliation Agreement, no state entity had any financial exposure to liability for this lawsuit or any other. (Harris App. 6, ¶5, 8-9) This evidence showed that the Regents stopped purchasing malpractice insurance relating to faculty clinical work at BUMCT and had ceased evaluating potential malpractice cases and budgeting for malpractice liability, because the exposure of any faculty physician for work at

BUMCT was, by contract, zero. (Harris App. 6, ¶¶12-15) The Affiliation Agreement partitioned control and liability: assigning to Banner the control of and liability for the rendition of medical care at BUMCT, and to the University the control of teaching and research. Even the teaching program, to the extent it was implemented at BUMCT, was subject to Banner control: the Affiliation Agreement gave Banner the right, without University consent, to modify, scale back, or even abolish the training program as of February, 2020. (Harris App. 6, Ex. 8, 16, 29)

The Harris family moved for partial summary judgment on Banner's government claims defenses, asserting that the laws should be applied only for the purpose intended by the legislature, and that physicians, as Banner employees acting within the scope of BUMG employment when they harmed Connor Harris, could not avail themselves of A.R.S. §§12-821 or 12-821.01. (Harris App. 5, 6) Petitioners opposed, and filed their cross motion for summary adjudication as to both the faculty physicians and Banner entities, asserting that despite potential dual employment, the faculty doctors were entitled to dismissal of their individual actions, and that if they were dismissed, Banner must also be dismissed. (Harris App. 7)

The request for BUMCT (the hospital) dismissal was premature in any event, as nursing malpractice, malpractice through negligent delay in radiology department reporting, and breach of contract remained at issue, in addition to the faculty doctors' conduct. Banner's Motion for Summary Judgment made no arguments about why

the hospital should be dismissed, as causes of action regarding breach of contract and nursing and radiology department malpractice remained. (Harris App. 8, p. 19)

The trial court found dual employment, but that as regards the rendition of clinical care at BUMCT, he could not parse out what part of that care was the product of University employment and what part was the product of Banner employment, so felt constrained to dismiss the case as to the faculty doctors. (Banner App. B) This ruling is the subject of plaintiff's Cross-Petition for Special Action, filed concurrently with this response.

At the hearing at which the court granted defendant's partial summary judgment as to the physicians, the court noted that case law in Arizona and elsewhere held that where the agent was dismissed on the basis of immunity, and not on the basis of a finding of the absence of fault (through adjudication or voluntary dismissal by the plaintiff), the principal, Banner in this case, *if not also covered by that immunity,* remained liable for the employees' tortious acts. Judge Gordon asked for supplemental briefing on this issue. The court required respondents and petitioners to submit supplemental briefs on point. The court ruled that Banner's vicarious liability for the acts of the faculty physicians survived the physicians' dismissal pursuant. (Banner App. G) Petitioners did not seek Rule 54(b) certification from the trial court, but proceeded directly to this petition.

II. ISSUES PRESENTED

Should a private, nongovernmental health care provider be permitted to avoid accountability for the tortious acts of its employees resulting in a child's death, through application of a government claims statute and statute of limitations which were designed only to protect the financial interests of governmental entities or employees, after those employees have been dismissed from the case solely on the basis of governmental immunity, without determination of whether or not the conduct of those non-governmental employees was negligent, and where by contract, no governmental financial exposure was possible?

III. REASONS JURISDICTION SHOULD BE REFUSED

Much of petitioners' petition is devoted to its ultimate appellate argument: its assertion that the trial court erred, rather than to the appropriate substance of the petition, which is to show why the issue raised in the petition should be considered so differently from all others that it must be undertaken outside the normal statutory course of events as set forth in Rule 54(b), particularly when granting this petition may result in one or in two appellate proceedings that may ultimately prove unnecessary. We deal below with the flaws in petitioners' appellate arguments, but focus primarily on the absence of accepted reasons to expedite petitioners' appeal, the adverse effects of expediting that appeal, and the conclusory and false nature of petitioners' "assertions of urgency and potential harm if the appeal is not expedited."

A. Jurisdiction of the Court of Appeals in Special Actions Pertaining to Denials Of Summary Judgment is Limited and is to be Extended Sparingly. *Warrinner V. Superior Court Of Maricopa County* 21 Ariz. App. 328, 329 ¶1, 519 P. 2d 81, (App. 1974).

There are least three compelling reasons for the existence and the application of Rule 54(b) which, under *Galax v. Vinyard,* 128 Ariz. 606, 608, 627 P.2d 1104, (Ct. App. 1981) and as conceded by Petitioners, make the court's denial of defendant's partial summary judgment currently unappealable. Each reason applies to this case.

First, a substantial fraction of urged "interlocutory" appeals are likely to prove unnecessary once the trial has been had. The prevailing party normally has no need or use for an appeal, making half of such "special actions" a retroactive waste of the time and resources of the parties, the litigators, and the appellate courts. Further, the full exposition of evidence at trial may make it clear that appeal even by the non-prevailing party is futile. In this case, if petitioners prevail, there would be no reason to appeal a trial court's ruling that vicarious liability in Banner survived the dismissal of the faculty doctors. If the respondents prevail, there would be no reason to appeal a trial court's ruling that A.R.S. §§12-821 and 12-821.01 applies to the physicians even where there is no governmental financial exposure and the tort was committed during the course and scope of non-governmental employment.

If respondents prevail at trial, further, petitioners may decide that an adverse outcome in a trial court, which does not bind other courts, is one thing, but an

appellate-level ruling that concurs with the trial court but carries precedential effect is something a prudent defendant would not want to chance.

Second, as is the case here, one interlocutory appeal may beget a second one, each or both of which may prove unnecessary after trial, hence a waste of the appellate court's time. Respondents believe that a decision on appeal that A.R.S. §§12-821 and 12-821.01 do not apply, where there is zero government financial exposure or where the act is done within the course and scope of non-governmental employment, complies with the principal that laws should be applied only as the legislature intended and respondents should have prevailed on their own partial summary judgment motion. However, once the court held that Banner's vicarious liability survived, respondents were content to put off any appeal on that issue until the end of the trial, if then. However, respondents cannot risk a trial in which Banner has *no* legal exposure for the acts or omissions of its physician-employees, and therefore, respondents must advance their own Cross-Petition for Special Action. Denial of the petition would save the parties and the appellate courts the costs in money, time, and delay of trial, in all likelihood, of *two* appeals.

Third, it is only after the trial is done that the full exposition of the facts will be made. The parties, in their determination of whether or not to appeal, and this Court, in its determination of the outcome of the appeal, are well served by having all relevant information in hand when appeal commences.

B. <u>There Are At Least Three *Complete* Remedies For The (Previously) Defendant Physicians Outside Of A Special Action.</u>

Petitioners argue that rare special action relief is necessary because of federal reporting requirements involving the National Practitioner Databank. No such argument was made to the trial judge. Because this argument was never made below, there is no record evidence about whether or under what circumstances reports must be made to the NPDB. Therefore, no arguments about the NPDB can or should be considered by this Court**.** *Sierra Tucson, Inc. v. Bergin*, 239 Ariz. 507, 511, ¶ 12, 372 P.3d 1031, 1035 (App. 2016)(special action-court refused to consider issue not raised below); *Yarbrough v. Montoya–Paez*, 214 Ariz. 1, n. 6, 147 P.3d 755, 762 n. 6 (App.2006) ("Generally, issues not raised or urged below or on review are deemed waived").

However, logically, it can be said that any argument about the NPDB does not justify special action relief. First, it should be noted that Banner routinely settles medical malpractice cases alleging fault against multiple physicians. In all such settlements, Banner must decide somehow who and how to report these payments to the NPDB. To argue that Banner suffers any quandary about how to report physicians in this one case, so as to justify special action relief, is disingenuous.

If the case goes to trial, and the defendant prevails, there is nothing to report to any National Physician Data Base (NPDB). If the case goes to trial and the

plaintiff prevails and then the defendant appeals and wins, there is similarly nothing to report.

If the verdict form at trial includes only the Banner petitioners whom the trial Court has left to us after dismissal of the faculty physicians, (Banner Health, BUMG and BUMCT), omitting any specific Banner employee names, then there is no basis for Banner to report any specific physician to the National Data Bank. A verdict against Banner, absent a special verdict naming physicians, may not be said to have been based on misconduct of any specific physician or, given asserted malpractice of nursing staff and radiology department personnel, on the basis of any physician at all. Banner may be held liable, if plaintiff prevails, under other non-physician based liability theories, based on the malpractice of the BUMCT nursing staff; the failure of the hospital's radiology department to timely carry out the stat-ordered ultrasound, or on the system failures of BUMCT and BUMG that resulted in having interns and residents render critical patient care in Radiology and Pediatric Surgery at night without effective or any instruction and supervision by qualified attending personnel.

Petitioners rely solely upon their appellant attorney's conclusory assertions, based on no evidence, affidavit, statutory or case law that our jury would be *required* to make findings regarding the negligence of specific physicians in order to find

against Banner, and that once this occurs, Banner is obliged to report these physicians to the National Physician Data Bank (NPDB). Not so.

First, as stated above, there is no requirement for the jury to explicitly find against any single non-defendant Banner physician-employee to find Banner liable. Plaintiff will not propose, and will not accept, any such verdict form. This ploy of trying to put non-parties on the verdict form has been tried (unsuccessfully) before by Banner, so that it can argue in closing, in an attempt improperly to gain sympathy for negligent physicians, how much this verdict will harm their careers. Absent a jury finding of liability other than Banner's, there is no foundation for any report against any specific physician by Banner to the NPDB and, as set forth above, there are a number of potential Banner tortfeasors to reasonably report, completely consistent with a general verdict against a Banner entity, if such a report is required.

Banner has vigorously denied any malpractice by any physician at BUMCT and refuses to name its own employees independently as non-parties at fault. Given these choices, Banner has every ability to determine for itself, internally what reporting is necessary and whom (physician or non-physician) to report.[4] This

[4] If this Court is inclined to accept statements of counsel as record evidence, then undersigned counsel informs the Court that the state's largest malpractice insurer, the Mutual Insurance Company of America, has had an internal procedure in place for years to determine how to report physicians in the event of a settlement or verdict that does not differentiate between individual defendants, and has apparently suffered no harm. In addition, it has been Banner's practice in many cases to request that plaintiffs' lawyers *not* name individual doctors and Banner has stated, in writing,

internal corporate process is neither not related to nor a legitimate consideration for the determination of vicarious liability. What Banner asserts would be "forever" harm will have been self-inflicted.

Second, the relevant portion of 42 U.S.C. §11131, the NPDB reporting statute, is as follows:

> "(a) **In general.** Each entity (including an insurance company) which makes payment under a policy of insurance, self-insurance, or otherwise, **in settlement (or partial settlement) of, or in satisfaction of a judgement** in a medical malpractice action shall report, in accordance with section 11134 of this title, information respecting the payment and circumstances thereof." (Emphasis added).

Defendant's interpretation that this reporting requirement could affect any of the currently-dismissed physicians, who have *not* had to settle or pay a judgment, contradicts the plain language of the reporting statute and its universal current usage.

Third, the defendant's assertion of massive, "forever" harm to the dismissed physicians if the trial goes forward against Banner, based to some degree on their conduct, is pure gossamer and is neither accurate nor relevant to this petition. One cannot practice medicine or malpractice law without coming across physicians, on a continuous and unremitting basis, who have been successfully sued and reported to the NPDB, often more than once, *but who nonetheless have not the slightest difficulty in getting hospital privileges and who have never had problems with*

---

that it will accept vicarious liability for physicians, so it must have some mechanism for reporting in those cases.

licensure. Indeed, experience, in more than a century of combined experience of respondents' two MD/JD counsels in the practice of medicine and of malpractice law, has shown that absent certain discrete types of misconduct, such as multiple repetitive major harmful errors in judgment, prescribing of drugs without examining the patient, or engaging in illicit relationships with vulnerable patients, doctors do not lose their licenses, and hospitals, which profit from physicians' business and referrals, do not restrict their privileges. Again, what is "forever" in this case is not alleged harm to the dismissed physician; it is the needless death of a 14-month old child.

C. <u>The Fact That Defendants May Have To Give Testimony At Trial About Their Conduct, And The Absence Of "Speed" If The Remedy Of Basic Arizona Appellate Rules Are Followed Are Irrelevant To The Determination Of Whether An Uncertain Eventual Possible Appeal Should Be Expedited.</u>

Such considerations apply to <u>all</u> petitioners and if adopted as a rationale for pre-trial special appeal, a bevy of non-exceptional cases would be appealed mid-case and Rule 54(b) would become a nullity.

D. <u>The Notion That A.R.S. §12-821.01 Would Be "Completely Eviscerated" If The Non-Governmental Employer's Vicarious Liability Persisted Through The Dismissal Of The Physicians, Is Pure Hyperbole</u>.

Banner's liability at present does not affect any governmental entity or employee. Petitioner's argument that the physicians will have lost their rights to Notices of Claims and shortened statutes of limitations are wrong on two counts: (1) these physicians can have no liability that would have somehow been avoided with

the application of the statutes, and (2) as respondent's Cross-Petition shows, at the time of their negligence, the physicians were working for their non-governmental employers, so they weren't entitled to the statutes' protections in any event.

The statutory immunity of neither the physicians nor any governmental entity are diminished if Banner is found liable. Whether Banner proves liable through vicarious liability or not, the physicians have been dismissed; have had to make no payments for their role in Connor Harris's death; and may not be re-sued on point. As the trial court pointed out, there is nothing in A.R.S. §12-821.01 that is intended to protect certain non-governmental entities from liability, or to give them a legally advantageous §12-821.01-shortened statute of limitations different from that available to other non-governmental entities.

E. <u>Petitioners' Assertion that the Trial Court's Ruling Was "Arbitrary and Capricious" Flatly Does Not Withstand Scrutiny</u>.

Review of the parties' briefing and the trial court's ruling reveals substantial support for the Judge Gordon's determination that on our facts, vicarious liability for Banner survives. This support includes case law and major authorities on point. The Restatement of the Law of Agency, 2d, §217, pp. 468-469 holds as follows (and has so held for more than half a century):

> In an action against a principal based on the conduct of a servant in the course of employment:
>
> (b) The principal has no defense because of the fact that:

ii. The agent had an immunity from civil liability as to the act.

Comment (b) clarifies: "Immunity is a word which denotes the absence of civil liability for what would be a tortious act but for the relation between the parties or the status or position of the actor...immunities, unlike privileges, are not delegable and are available as a defense only to persons who have them….Where the principal directs an agent to act or the agent acts in the scope of employment the fact that the agent has an immunity from liability does not bar a civil action against the principal."

The Reporters' notes set out the extent to which the Restatement Rule has been generally adopted:

> At the time of the original Restatement, the American cases were about evenly divided. Since the Restatement, however (1958), the trend has been strongly to enforce the liability of the Master. This has been done in the District of Columbia, Alabama, Florida, Georgia, Kentucky, Massachusetts, Minnesota, Missouri, New jersey, North Carolina, Ohio, and Pennsylvania.

No change as to any of these points was made in the Restatement of Law (Agency) 3rd. Respondents' brief on point before the trial court verifies, through higher court decisions from many states, the virtually universal acceptance of liability of the principal where the agent is dismissed on the basis of an immunity not applicable to the principal itself.

Prosser concurs[5] and multiple cited Arizona cases (as well as cited multiple Supreme Court cases from other states) also *dispute* the assertion that dismissal of an agent "for any reason" including statutory immunity is a "dismissal on the merits" or that it protects the principal from continuing liability: see *Strickler v. Arpaio,* 2012 WL 6200612 (D. Ariz. Dec 12, 2012) (holding that it is senseless to assert that dismissal through statutory immunity justifies the description "judgment on the merits," which should mean "a finding of the absence of fault"); *Hovatter v. Shell Oil Co.,* 111 Ariz. 325, 326, 529 P.2d 224, 225 (1974) (the Arizona Supreme Court rejected the notion that a dismissal based on the running of the statute of limitations can plausibly be called a "finding of nonfault," which would illogically and counterfactually impute nonfault to the principal); *Lee v. State,* 225 Ariz. 576, 579 ¶10, 242 P.3d 175, 178 (App. 2010) (holding that the notice of claim statute is analogous to a statute of limitations); *Kopp v. Physician Group of Arizona, Inc.,* 244 Ariz. 439,442, ¶13, 421 P.3d 149,152 (2018) overruling the approaches of *Law* and *DeGraff* that <u>any</u> dismissal of an agent, on *any* basis, including a procedural dismissal, is to be taken as proof of non-fault); and *Brumbaugh v. Pet Inc.,* 129 Ariz. 12, 13, 628 P.2d 49, 51 (App. 1981), holding *directly on point with our case* that a dismissal of an agent

[5] See Prosser, Law of Torts, (3rd Ed.1964)§117, P.890-91: "Accordingly, the overwhelming majority of the courts now hold that the employer is liable even though the servant is immune from suit."

on grounds of immunity does *not* extinguish vicarious liability of an employer/principal *where that immunity does not apply to the principal.*

The broad support the trial court found in Arizona case law, the legislative intent of A.R.S. §12-821.01, the authority of the Restatement of Agency and Prosser, and the virtually unanimous conclusions of supreme courts outside of Arizona make the assertion of "arbitrariness" and "capriciousness" by the trial court unsupportable.

F. <u>The Genesis Of Petitioners' Flawed Arguments And Inapplicability Of Their Cited Cases To The Specific Situation Here, Where A Nongovernmental Corporation Seeks The Protection Of The Government Claims Statute.</u>

1. <u>Defendant's faulty reasoning has its origin in misconstruction of the seminal early case, *DeGraff,* regarding the relationship of agent and principal liability, with that error being repeated in some later cases.</u>

The genesis of much of the flawed reasoning in petitioner's argument and in the cases cited is this: An initial seminal case, *DeGraff v. Smith,* 62 Ariz. 261, 157 P.2d 342 (1945) was interpreted overbroadly and improperly by the Court in *Law v. Verde Valley,* 217 Ariz. 92, 170 P.3d 701 (App.2007), so that *DeGraff's* initial rational explication of the abolition of vicarious liability in the principal *in a situation in which fault was conceded by the plaintiff to be absent in the agent* through voluntary dismissal was erroneously held to support a leap of illogic, coming in three steps:

1) <u>Any</u> dismissal of an agent, on <u>any</u> basis which is a "dismissal with prejudice," i.e. which precludes re-litigation, is a dismissal "on the merits;"

2) Any dismissal on the merits is proof that the agent was not at fault; and

3) Any situation in which the agent was not at fault cannot support vicarious liability for the principal, because where there is no fault, there is no fault to impute

That this leap is without legal or logical legitimacy should be clear.

The term "on the merits" has a meaning. It means the assertions of defendant's misconduct have been examined and conclusions about liability drawn therefrom. It is different from a determination "not on the merits" in which the outcome is determined by something other than an examination of the acts of the accused. In our case, a negligence determination "on the merits" would require a review by the finder of fact of the conduct of the defendant doctors, a determination of whether or not that conduct violated the applicable standard of care, and then whether that violation, if present, was a legal cause of harm. A determination "not on the merits" would be one, as the Supreme Court held in *Hovatter v. Shell Oil Co.(Ibid.),* that was the result of running of the statute of limitations, or as *Strickler v. Arpaio,* (Ibid.), *Brumbaugh v. Pet Inc.,* 129 Ariz. 12, 13, 628 P.2d 49, 51 (App. 1981), the Second and third Restatements of Agency, Prosser, and virtually all other jurisdictions hold, dismissal on the basis of a statutory immunity, if that immunity is not applicable to the principal.

The word "fault" as applied to a defendant also has meaning. It means that the defendant has done something wrong in the eyes of the law. Being dismissed from a case in the absence of any examination of defendant's conduct, based only on actions or failures to act of plaintiff's attorneys, may constitute valid protection for the defendant from liability or re-suit, but only a massive stretch of the English language would permit the conclusion that this meant defendant had been proven not to be at fault. A bank robber who eludes arrest until the criminal statute of limitations has run remains a bank robber; he just doesn't go to jail. A negligent physician whose negligence causes a child's death but who escapes because the statutory requirements of A.R.S. §12-821.01 were not met, is still a negligent physician whose actions have caused harm: he just doesn't have to pay for it.

We assert that "dismissal with prejudice" may or may not be a 'dismissal on the merits" and may or may not prove "non-fault." *Law's* error was to accept these false equivalences, through improper interpretation of *DeGraff v. Smith*. The later cited cases, from *Mink v. Arizona,* 2011 WL 90107 on, are not "independent reviews of the law" but are rather rote repetition of the *Law* misinterpretation.

To wit: *DeGraff* gave three reasons for determining that after the agent is voluntarily dismissed, there may be no fault to impute to the principal, so there may be no persistent vicarious liability available to the plaintiff. First, at p. 268, it cited the majority opinion in the United States (in 1945), through citation of 35 Am. Jur.

Section 534: "…according to a majority of cases in which the question of persistent *respondeat superior* liability after dismissal of the servant] has been raised, the employer is held not to be liable. Thus, according to the weight of authority**,** where the employer and employee are joined as parties defendant in an action for injuries inflicted by the employee, a **verdict** which exonerates the employee from liability for injuries caused solely by the negligence or malfeasance of the employee requires also the exoneration of the employer" (Emphasis added.)

Respondent's citations from the Second Restatement of Agency and Prosser above show that *DeGraff*'s 1945 reliance on *national consensus* being "non-persistence of liability in the principal" has, for more than sixty years been quite the opposite, the national consensus being that the principal remains liable even where the agent is dismissed. Further, the other two bases in *DeGraff* for potential dismissal of the principal if the agent is dismissed speak only of dismissals that involve actual determination of fault or its absence.

Second, at p. 268, *DeGraff* , explaining the Court's reasoning, asserts "….this is… upon the ground that the sole basis of liability is the negligence or wrongdoing of the employee imputed to the employer under the doctrine of respondeat superior; the acquittal of the employee of wrongdoing conclusively negatives liability of the employer." (Emphasis added.) It is an "acquittal" – an actual determination of innocence in the agent that means that there is no fault to impute to the principal.

Third, *DeGraff* requires that the grounds for dismissal of the agent be *equally applicable to the principal* for the agent's dismissal to extinguish the principal's exposure: "This is in accord with the general principle that a judgment in favor of either principal or agent in an action brought by a third party, rendered upon a ground equally applicable to both, should be accepted as conclusive against a subsequent right of action against the other." (Emphasis added)

In our case, there was no verdict; there was no acquittal; the physicians were not exonerated of negligence causing harm; and the grounds for their dismissal, A.R.S§12-821.01 immunity, is not applicable to non-governmental Banner or its subsidiaries.

But then came *Law v. Verde Valley,* 217 Ariz. 92, 170 P.3d 701 (App.2007), erroneously citing *DeGraff* for the principal that dismissal with prejudice, even if through stipulated settlement, is a "dismissal on the merits;" that all dismissals on the merits, regardless of their basis, prove "there is no fault to impute;" and therefore any dismissal of an agent extinguishes vicarious liability in the principal. Petitioners' other cited cases parrot this misreading of *DeGraff.* So *DeGraff's* precision is misread by *Law* and *Mink,* then *Law* and *Mink* become the authorities for further progeny. That this mis-citation and misconception of legitimate agency law is not uniform in Arizona is shown by the cited Arizona cases, *Strickler, Hovatter* and *Brumbaugh.* More recent Arizona courts, in *Chaney* and *Kopp,* have explicitly

abrogated some misinterpretations of *DeGraff* that were bruited in other cases, and have, sometimes struggling, found ways to make sure that the injured plaintiff does not wind up without a cause of action against the principals. This is further evidence that the appellate courts are now ready, explicitly rather than intermittently or in roundabout ways, to adopt the virtually unanimous position of the Restatements of Agency. (Petitioner's footnote citation of dicta in *Kopp* as though it was the law of the case is misleading and improper).

Support for our trial Court's determination is particularly likely when our own case comes up for appeal, where abolishing *respondeat superior* liability where the agent is dismissed for reasons unrelated to determination of fault, through an agent immunity which the Restatement explicitly holds does not exonerate the principal; and which, if reversed, would put the governmental protections of A.R.S. §§12-821 and 12-821.01 up for sale to nongovernmental corporations like Banner, that latter position being ripe for clear analysis and rejection, once and for all.

2. <u>A central, appropriate consideration of the trial court was that in this case, the party seeking protection of the government claims statute was a nongovernmental entity, never intended by the Legislature to receive protection through the statute. This crucial circumstance is not addressed in any cases cited by petitioner.</u>

The trial court, as set out in the hearing on point and in its ruling, appropriately recognized the applicability of a central element of the *DeGraff* analysis: that vicarious liability in the principal is extinguished if the agent is dismissed with

prejudice "rendered upon a ground equally applicable to both." The trial court understood that all cases cited by petitioners *failed* to even address this case's central circumstance: a government agent, dismissed with prejudice on grounds which did *not* apply to the principal. In *Law,* doctors whose agency/employment by the hospital was never established, were dismissed, some voluntarily, some by settlement, none on the basis of immunity, as they were not government agents. In *Mink,* both the dismissed agents, city employees, and the principal as to whom vicarious liability was asserted, were governmental entities, so the ground for dismissal of the agents, A.R.S. §12-821.01, was equally applicable to the principal. The same holds for the *Nixon* case, where the dismissal of county employees for lack of notice of claim also protected the county for which the dismissed Petitioners worked; for *Ferreira,* where dismissal of county employees for lack of claim notice protected Maricopa County; and for *Camboni*, in which the dismissal of a state Court judge for failure to give a claim notice, protected the State Bar.

None of the cases petitioner claims as dispositive at p. 12 of their brief have our case's fact pattern. All of petitioner's cited cases have either government agents *and* government principals, so potential A.R.S. §12-821.01 protection applies to both (*Mink, Nixon, Ferreira and Camboni)* or no immunity in the agent as to which transfer of immunity is claimed by the principal (*Law).* If and when this Court hears the full appeal, it must recognize the inapplicability of petitioner's cited cases, as

they do not address our case's central issue which is: may the government claims statute be used to protect a non-governmental entity from liability.

3. ***Verrastro v. Bay Hospitalists, LLC*, 208 A.3d 720 (Del. 2019) cited by the trial Court, succinctly summarizes the analysis appropriate to this case, from the perspective of appropriate use of legal language and avoidance of absurd results.**

The trial court took into account *Verrastro* case (as well as close to two dozen cited concurring cases from other states, Prosser and the Restatement) as being particularly insightful, requiring the parties to comment on it at hearing. In *Verrastro,* the Delaware Supreme Court case, decided in 2019, doctors and a hospital were sued for medical malpractice, but the required "Notice of Intent" (a prerequisite "claim" equivalent) was sent to the wrong address for the doctor, so the doctor was not timely served, and was dismissed from the case because of that failure of notice. The hospital sought dismissal because the source of its liability was the doctor's malpractice. The Delaware Supreme Court held that the claim of vicarious liability against the hospital vicarious was *not* extinguished by the failure to give a notice of intent to the "agent," leading to the running of the statute of limitations as to the agent. It characterized this basis for dismissal of the hospital, along with what it called 'analogous' immunity dismissals, as_inappropriate grounds for dismissal of claims against the hospital, noting the way in which "on the merits" must appropriately be used, and the absurd results that would follow if non-merit based dismissals produced dismissals of meritorious claims against principals. Referring

to the Second Restatement of Agency §217(B), the court explained its view in lucid, powerful, universally applicable terms:

> But our review of traditional respondeat superior principles leads us to conclude that § 217B's "on the merits" language was not intended to encompass procedural dismissals that do not adjudicate the wrongfulness of the agent's conduct. Instead and in context, we believe that the phrase "judgment on the merits" in § 217B(2) means judgment on the merits of the conduct, that is, a judgment finding that the employee is not culpable.
>
> [9] [10] [11]This conclusion is consistent with…the notion that "the crux of *respondeat superior* liability is a finding that the employee was negligent" and not whether the injured person has a right of action against the employee. Likewise, this approach is consistent with how procedural dismissals are treated in the res judicata context, where "[a] judgment against the injured person that bars him from reasserting his claim against the defendant in the first action extinguishes any claim he has against the other person responsible for the conduct unless ... [t]he judgment in the first action was based on a defense that was personal to the defendant in the first action."36 Thus, a dismissal can be "on the merits" as it concerns the viability of another suit against the dismissed party without having a collateral effect on a potentially responsible third party."
>
> "[12] [13]Section 217B(2), in our view, was meant to prevent substantively inconsistent outcomes and not meant to reach the issue of whether procedural defenses run from an agent to a principal. For example, §217 of the same Restatement states that "[i]n an action against a principal based on the conduct of a servant in the course of employment ... [t]he principal has no defense because of the fact that the agent had an immunity from civil liability as to the act."37 The only consistent reading of the two sections of the Restatement is to say that, even if a case against an agent were subject to an immunity defense …that immunity would not accrue to the benefit of the principal except to the degree that the immunity applies equally to both principal and agent regardless of any principal-agent relationship. In this regard, we view a time bar as analogous to a

> claim of immunity in that neither indicates the absence of wrongdoing, but only that the wrongdoer may not be held liable. In the respondeat superior context, an agent's assertion of immunity does not depend on his lack of culpability, and the same can be said of any statute-of-limitations defenses that might be applicable."
>
> To [the extent that prior ruling] eradicates otherwise timely claims against a principal because claims based on the same facts would be time-barred if made against the principal's agent, we overrule it. We hold that, in a *729 negligence action against a principal based on the doctrine of respondeat superior, the dismissal of the agent on defenses personal to the agent does not automatically eliminate the principal's vicarious liability.
>
> 2. Avoidance of absurd results
>
> [14]Greco's treatment of a statute-of-limitations dismissal of a tort action against an agent as a merits-based determination that bars the prosecution of the action against the principal under the doctrine of *respondeat superior* can lead to absurd results. For instance, as recognized by the Restatement (Second) of Judgments, the general rule is that the employee is not even a necessary party to an action against the employer based on *respondeat superior*:
>
> > "[B]oth the primary [tortfeasor] and the person vicariously responsible for his conduct are ordinarily subject to liability to the injured person. In some situations, the vicariously responsible person is liable only if the liability of the primary obligor is established; this is true, for example, of an insurer's liability for the acts of the insured. Ordinarily, however, the person vicariously responsible may be held liable even though the liability of the primary obligor has not been established. Moreover, in some situations the person vicariously responsible may be held liable even though an action cannot be maintained against the primary obligor .... [U]nder prevailing procedural rules the injured person ordinarily is not required to join both and may decide to bring suit in the first instance against only one of them."

Verrastro v. Bay Hospitalists, LLC, 208 A.3d 720, 728-729 (Del. 2019).

Respondents assert that the Delaware Supreme Court's reasoning and holding

should inform any decision in this case.

IV CONCLUSION

For the foregoing reasons, respondents respectfully request that the Court reject petitioners' special action jurisdiction relief.

RESPECTFULLY SUBMITTD this 25th day of October, 2019.

LAW OFFICE OF JOJENE MILLS, P.C.

By: /s/ JoJene Mills

JoJene Mills
1670 East River Road, Suite 270
Tucson, Arizona 85718

Arlan Cohen, M.D., J.D.
LAW OFFICES OF ARLAN A COHEN
1008 South Oakland Avenue
Pasadena, California 911

Lawrence J. Rudd, M.D., J.D.
RUDD MEDIATION
1414 Ridge Way
Pasadena, California

Attorneys for Plaintiffs/Real Parties in Interest

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the attached Response to the Petition for Special Actions uses type of at least 14 points, is double spaced, and uses proportional type-face, and contains 8,974 words. The Response does not exceed the word limit set by rule 7(e), R.P.S.A.

/s/ JoJene Mills

CERTIFICATE OF SERVICE

JoJene Mills, being first duly sworn, upon oath states that on the 25th day of October, 2019, she caused the original of the foregoing Response to Respondents Harris to Petition for Special Action to be electronically filed with the Arizona Court of Appeals Division Two website and sent via e-mailing and mailing, via First Class Mail to:

Honorable Richard E. Gordon
Judge of the Superior Court Pima
County Superior Court
110 W. Congress Street
Tucson, AZ 85701
mdimond@sc.pima.gov
Respondent Judge

Eileen Dennis GilBride
JONES, SKELTON & HOCHULI, P.L.C.
40 North Central Avenue, Suite 2700
Phoenix, Arizona 85004
egilbride@jshfirm.com
Attorney for Defendants/Petitioners

GinaMarie Slattery
SLATTERY PETERSEN PLLC
5981 East Grant Road, Suite 101
Tucson, Arizona 85712
gslattery@slatterypetersen.com
Attorney for Defendants/Petitioners

Kathleen Rogers
SLUTES SAKRISON & ROGERS PC
4801 E Broadway Blvd Ste 301
Tucson, AZ 85711-3635
krogers@sluteslaw.com
Attorneys for Co-Defendants Jeff C. Hoehner and Arizona Pediatric Surgery and Urology, Ltd.

/s/ JoJene Mills